(4)

No. 99-973

Supreme Court, U.S.
FILED
JAN 6 2000
CLERK

In The

# Supreme Court of the United States

JOHN BAKER,

*Petitioner,*

v.

ANITA JOHN,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska**

## BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

BRUCE M. BOTELHO
*Attorney General*
JUDITH RABINOWITZ
*Assistant Attorney General*
State of Alaska
Department of Law
Attorney General's Office
P.O. Box 1100300
Juneau, Alaska 99811-0300
(907) 465-3600
D. REBECCA SNOW*
*Assistant Attorney General*
State of Alaska
Department of Law
Attorney General's Office
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701-4679
(907) 451-2811
*Counsel for Amicus Curiae State of Alaska*

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF THE STATE OF ALASKA AS *AMICUS CURIAE* ..... 1

REASONS FOR DENYING THE WRIT ..... 2

I. The Alaska Supreme Court Correctly Applied This Decision In *United States v. Holliday* To Conclude That The Political Branches Of The Federal Government Have Recognized Alaska Tribes ..... 4

II. The Petition Misstates The Jurisdictional Consequences Of The Alaska Supreme Court's Decision That Alaska Tribes Retain Inherent Jurisdiction to Adjudicate The Custody Of Member And Membership-Eligible Children ... 8

III. The Alaska Supreme Court's Interpretation of The Indian Child Welfare Act Is Consistent With Other Courts' Interpretation Of The Same Language ..... 9

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

Page

### Federal Cases

*Confederated Tribes v. Superior Court*, 945 F.2d 1138 (9th Cir. 1991) ..... 10

*Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2nd Cir. 1994) ..... 4

*United States v. Holliday*, 70 U.S. 407 (1865) ..... 4

*James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987) ..... 4

*Native Village of Venetie I.R.A. Council v. State of Alaska*, No. F86-0075 CIV (HRH) (D. Alaska, Sep. 20, 1995) ..... 7

### State Cases

*Application of Defender*, 435 N.W.2d 717 (S.D. 1989) ..... 9

*Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) ..... 4

*Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) ..... 2, 3

*Walksalong v. Mackey*, 549 N.W.2d 384 (Neb. 1996) ..... 9

### Federal Statutes and Regulations

Federally Recognized Indian Tribe List Act of 1994:

25 U.S.C. § 479a-479a-1 ..... 6

25 U.S.C. § 479a, Finding (3) ..... 6

25 U.S.C. § 479a, Finding (4) ..... 6

25 U.S.C. § 479a, Findings (6) and (12) ..... 6

25 U.S.C. § 479a-1(a) ..... 6

TABLE OF AUTHORITIES – Continued

Page

Indian Child Welfare Act of 1978:

25 U.S.C. §§ 1901-1963 ..... 3

25 U.S.C. § 1903 ..... 3

25 U.S.C. § 1903(1) ..... 9

25 U.S.C. § 1911, § 1918 ..... 3

Jurisdiction Act:

Act of June 19, 1935, 49 Stat. 388 ..... 6

Tlingit and Haida Status Clarification Act of 1994:

25 U.S.C. §§ 1212-1215 ..... 7

25 U.S.C. § 1212(2) ..... 7

25 U.S.C. § 1213 ..... 7

25 U.S.C. § 1214(a) ..... 7

44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) ..... 10

58 Fed. Reg. 54,364 (Oct. 21, 1993) ..... 5

58 Fed. Reg. 54,364-69 (Oct. 21, 1993) ..... 5

58 Fed. Reg. 54,366 (Oct. 21, 1993) ..... 5

STATE STATUTES

Alaska Stat. § 44.21.410 ..... 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

H. Rep. No. 103-781, *reprinted in* 1994 U.S.C.C.A.N. 3769 ..... 6

B. J. Jones, *The Indian Child Welfare Act Handbook* 14 (1995) ..... 10

Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 Minn. L. Rev. 927, 950 (1999) ..... 10

Solicitor of the Dep't of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Op. M-36975 (Jan. 11, 1993) ..... 5

Sup. Ct. R. 10 ..... 2

## BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

### INTEREST OF THE STATE OF ALASKA AS *AMICUS CURIAE*

The State of Alaska has a substantial interest in the issues presented by the petition and in urging its denial. At the request of the Alaska Supreme Court, the State presented its views as *amicus curiae* in this matter below. In adopting the position urged by the State, the Alaska Supreme Court deferred to the federal recognition of Alaska's 200-plus tribes. The State has a continuing interest in the correctness of that result which resolved prior conflicts between state and federal law.

The Alaska Supreme Court also correctly held that Alaska tribes retain jurisdiction that is concurrent with the State of Alaska over child custody disputes involving tribal member or membership-eligible children. Further, it embraced the State's suggestion that the high court articulate comity criteria for recognition of tribal court proceedings and orders and, in so doing, provided important guidance to the State's lower courts. Thus, the decision below significantly advances the prospects for more cooperative, effective, and nonduplicative working relations between state and tribal courts in Alaska.

Finally, the State has an interest in clarifying for the Court that the entity representing petitioner, the Office of Public Advocacy, does not represent the State's interests or legal positions in this matter. Pursuant to Alaska law, the Office of Public Advocacy represents needy individuals in particular categories of cases. *See* Alaska Stat.

§ 44.21.410. For these reasons, the State seeks to aid the Court's consideration of the petition.

## REASONS FOR DENYING THE WRIT

Petitioner urges review of questions that do not meet this Court's certiorari criteria. *See* Sup. Ct. R. 10. The petition seeks review of the decision of the Alaska Supreme Court that Alaska's tribes enjoy federal recognition. Contrary to the suggestions of the petition, Pet. 22, that decision brings harmony, rather than conflict, to state and federal law on this point.

As amici to the proceedings before the Alaska Supreme Court, the State, the United States, and Tribal governments throughout Alaska all urged the court to conform state law to federal law by revisiting its decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) (holding that the federal government had not recognized most Alaska Native Villages as tribes).[1] The Alaska Supreme Court reviewed the intervening actions of the federal government and correctly concluded that *Stevens* had been overtaken by events:

> Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized

[1] In the proceedings below, the parties did not dispute the federally recognized status of the Native Village of Northway. In fact, petitioner, Mr. Baker, initiated his custody dispute in the Northway tribal court.

> the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.

Pet. App. 22. This holding does not warrant review.

Neither does the narrow statutory interpretation issue presented by the petition warrant review. The Alaska Supreme Court properly determined that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, does not apply to this parental custody dispute. ICWA's provisions apply only to "child custody proceedings" as defined by the Act. *See* 25 U.S.C. § 1911, § 1918. Section 1903 of ICWA specifically excludes from the definition of child custody proceedings the award of custody to a parent in a divorce proceeding. Like other appellate courts, the Alaska Supreme Court interpreted ICWA's divorce exception to apply to custody disputes between unmarried parents. There is no conflict between the Alaska Supreme Court and other state courts of last resort, or between the Alaska Supreme Court and the circuit courts of appeal, on this point of statutory interpretation.

In short, the State agrees with the Alaska Supreme Court's decision in this case and welcomes the resolution that it brings to State-Tribal relations in Alaska. The petition should be denied because this case does not satisfy any of the Court's criteria for review.

## I. The Alaska Supreme Court Correctly Applied This Court's Decision In *United States v. Holliday* To Conclude That The Political Branches Of The Federal Government Have Recognized Alaska Tribes.

The State of Alaska and the Alaska Supreme Court consistently have maintained that whether there are tribes in Alaska is a federal matter principally committed to the political branches of the federal government. *See Atkinson v. Haldane*, 569 P.2d 151, 162-163 (Alaska 1977) (federal executive branch determination that Metlakatla Indian Community is an Indian tribe is a nonjusticiable political question). The Alaska Supreme Court's *Atkinson* rule derives directly from this Court's decision in *United States v. Holliday*, 70 U.S. 407 (1865). *Holliday* established that,

> [i]t is the rule of this court to follow the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

*Id.* at 419.[2] In keeping with *Holliday* and *Atkinson*, the Alaska Supreme Court properly reviewed the actions of the Interior Department and Congress to ascertain whether Alaska tribes are federally recognized.

---

[2] Other federal courts have described tribal status determinations as within the "primary jurisdiction" of the Interior Department, *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2nd Cir. 1994), and as within the Interior Department's congressionally delegated authority. *Id.* at 59; *James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

As the Alaska court observed, before 1993 neither the Department of the Interior nor Congress had indicated unequivocally whether Alaskan Native entities, other than the Central Council of Tlingit and Haida Indian Tribes of Alaska and the Metlakatla Indian Community, were federally recognized tribes.[3] In early 1993, the Solicitor of the Department of the Interior issued a comprehensive opinion on the status of Alaska Natives and Alaska Native lands. Solicitor of the Department of Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Op. M-36975 (Jan. 11, 1993). Although the Solicitor's Opinion concluded that there were tribes in Alaska, it did not identify which entities or villages so qualified. *Id.* at 58-59. That question was answered by the Interior Department's 1993 tribal entities list. 58 Fed. Reg. 54,364 (Oct. 21, 1993). The preamble to the 1993 list states that,

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

58 Fed. Reg. 54,366 (Oct. 21, 1993). The Alaska Supreme Court correctly read the Interior Department's list as confirming the Department's recognition of the tribal status of Alaska villages. Pet. App. 20.

---

[3] *See generally* 58 Fed. Reg. 54,364-69 (Oct. 21, 1993).

Following the Interior Department's publication of the 1993 list, Congress enacted the 1994 Federally Recognized Indian Tribe List Act (List Act), Pub. L. 103-454, Title I, 108 Stat. 4792 (codified at 25 U.S.C. §§ 479a-479a-1 (1994)). The List Act compelled the Alaska Supreme Court's conclusion that it must defer to the federal government's recognition of Alaska tribes.

The List Act was precipitated, in part, by Congress' concern that the Central Council of Tlingit and Haida Indian Tribes of Alaska, an Alaska regional tribe recognized by Congress in 1935, Act of June 19, 1935, 49 Stat. 388 as amended, had been dropped from the Interior Department's 1993 list of recognized tribes. H. Rep. No. 103-781, *reprinted in* 1994 U.S.C.C.A.N. 3769. In response, the List Act reserved to Congress the sole authority to terminate tribes. 25 U.S.C. § 479a, Finding (4).

The Act further required that the Secretary of the Interior Department annually publish in the Federal Register "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a). It also confirmed the Secretary's authority to recognize tribes. 25 U.S.C. § 479a, Finding (3). The List Act's findings clarified that the Secretary's list is to reflect "all federally recognized tribes," and that the United States "maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." 25 U.S.C. § 479a, Findings (6) and (2).

In a corollary action, Congress restored the Central Council of Tlingit and Haida Indian Tribes of Alaska to

the Secretary's list. Tlingit and Haida Status Clarification Act, Pub. L. 103-454, Title II, 108 Stat. 4792 (codified at 25 U.S.C. §§ 1212-1215 (1994)). The Tlingit & Haida Act not only reaffirmed the Central Council of Tlingit and Haida as a federally recognized tribe, 25 U.S.C. § 1213, it also expressly acknowledged the "government-to-government relationship between the United States and other federally recognized Alaska Native tribes." 25 U.S.C. § 1214(a). Since Congress' findings in connection with the Tlingit & Haida Act accepted the Interior Department's 1993 list as *the* list of federally recognized tribes, 25 U.S.C. § 1212(2), the "other federally recognized Alaska Native tribes" referenced in section 1214(a) are those tribes that appear on the 1993 list.

Hence, the List Act together with the Tlingit & Haida Act confirmed that, but for the omission of the Central Council of Tlingit and Haida, Congress considered the Interior Department's list to be definitive as to Alaska tribes. The federal district court of Alaska so interpreted the combined actions of the Interior Department and Congress:

> Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). *This leads to the conclusion that Congress approved of this list.*

*Native Village of Venetie I.R.A. Council v. State of Alaska*, No. F86-0075 CIV (HRH) (D. Alaska, Sep. 20, 1995) (emphasis added).

Assuming *arguendo*, that there was prior doubt as to the Secretary's authority to identify and list federally recognized tribes, such doubts (and petitioner's claims, Pet. 23-26), are resolved by the List Act. Plainly, the post-List Act lists of federally recognized tribes were promulgated pursuant to the Secretary's delegated authority and have Congress' blessing. If Congress did not perceive that the Secretary of the Interior had exceeded his delegated powers, this Court should feel no need to review petitioner's claims in this regard.

## II. The Petition Misstates The Jurisdictional Consequences Of The Alaska Supreme Court's Decision That Alaska Tribes Retain Inherent Jurisdiction To Adjudicate The Custody Of Member And Membership-Eligible Children.

In an effort to paint a jurisdictional conflict where none exists, petitioner mischaracterizes the jurisdictional consequences of the Alaska Supreme Court's decision. The decision does not, as suggested by the petition, empower Alaska tribes to "supersede" the jurisdiction of Alaska courts to adjudicate child custody disputes. Pet. 21. Instead, the decision confirms the jurisdiction of the Alaska state courts, concurrent with Alaska tribal courts, to hear child custody disputes involving tribal children. Pet. App. 45-50.

Indeed, recognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans. When coupled with the newly articulated comity criteria, it will also reduce parents'

forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

## III. The Alaska Supreme Court's Interpretation Of The Indian Child Welfare Act Is Consistent With Other Courts' Interpretation Of The Same Language.

The Alaska Supreme Court held that ICWA did not apply to the parental custody dispute between Ms. John and Mr. Baker, relying on both statutory language and legislative history. Pet. App. 11-14. The Ninth Circuit and the state courts of last resort that have considered whether custody disputes between unmarried parents are excluded from the coverage of ICWA have reached the same conclusion.

Congress created an express exception to the types of child custody proceedings governed by ICWA for "an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1). The Alaska Supreme Court determined that all parental custody disputes fall within this exception. The supreme courts of Nebraska and South Dakota also have concluded that ICWA does not apply to a custody dispute between unmarried parents. *Walksalong v. Mackey*, 549 N.W.2d 384, 387 (Neb. 1996) (ICWA inapplicable to custody dispute between parents in which one of the parents has physical custody of the child); *Application of Defender*, 435 N.W.2d 717, 721 (S.D. 1989).

The Court of Appeals for the Ninth Circuit also has considered the question of ICWA's applicability to a parental custody dispute between unmarried parents. *Confederated Tribes v. Superior Court*, 945 F.2d 1138 (9th Cir. 1991). It concluded that the definition of child custody proceedings "does not include the resolution of the longer-term custody dispute between [these] parents." *Id.* at 1140 n.3. *See also* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979); B. J. Jones, *The Indian Child Welfare Act Handbook* 14 (1995); Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 Minn. L. Rev. 927, 950 (1999). The State has found no authority to the contrary. This issue does not warrant review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE M. BOTELHO
*Attorney General*
JUDITH RABINOWITZ
*Assistant Attorney General*
State of Alaska
Department of Law
Attorney General's Office
P.O. Box 1100300
Juneau, Alaska 99811-0300
(907) 465-3600
D. REBECCA SNOW*
*Assistant Attorney General*
State of Alaska
Department of Law
Attorney General's Office
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701-4679
(907) 451-2811
*Counsel for Amicus Curiae*
*State of Alaska*